No. 16311

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PATRICK MILLARD EDDY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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Jurisdictional Statement.

This case originally arose by reason of offenses committed in the year 1947 in violation of Title 18, U. S. C., Section 320, 1946 ed. (Mar. 4, 1909, chap. 321, Sec. 197, 35 Stat. 1126; Aug. 26, 1935, chap. 694, 49 Stat. 867), and Title 18, U. S. C., Section 408, 1946 ed. (Oct. 29, 1919, chap. 89, Secs. 1-5, 41 Stat. 324). The jurisdiction of the District Court was originally founded upon Title 18, U. S. C., Section 541, 1946 ed. (Mar. 4, 1909, chap. 321, Sec. 304, 35 Stat. 1153; Mar. 3, 1911, chap. 231, Sec. 291, 36 Stat. 1167); Title 26, U. S. C., Section 103, 1946 ed. (Mar. 3, 1911, chap. 231, Sec. 42, 36 Stat. 1100), and Title 18, U. S. C., Section 408, 1946 ed., *supra.*

Appellant thereafter made a motion presumably under Title 26, U. S. C., Section 2255 (June 25, 1948, chap. 646, 62 Stat. 967, amended May 24, 1949, chap. 139, Section 114, 63 Stat. 105).

The jurisdiction of this court was invoked under the provisions of Title 28, U. S. C., Section 1291 (June 25, 1948, chap. 646, 62 Stat. 929), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. (as amended Dec. 27, 1948, effective Jan. 1, 1949 and April 12, 1954, effective July 1, 1954).

Statement of the Case.

On January 19, 1948, appellant was arraigned in Case No. 19743 upon an indictment charging robbery of a post office clerk under the aggravating circumstances of having put in jeopardy the life of the clerk by the use of a dangerous weapon, namely, a revolver, in violation of former Section 320 of Title 18, U. S. C. On that date appellant entered a plea of not guilty before the Honorable J. F. T. O'Connor. The court appointed Mr. Sidney A. Cherniss, Sr., an able and experienced criminal lawyer, to defend the appellant. On February 2, 1948 the case again came on before Judge O'Connor at which time a motion by counsel for appellant to withdraw the plea of not guilty in Case No. 19743 was granted and appellant thereafter entered a plea of guilty to the indictment. At the same time, appellant was arraigned in case No. 19801 on an indictment charging him with having transported an automobile from Los Angeles, California, to St. Louis, Missouri, in violation of former Section 408 of Title 18, U. S. C., to

which charge appellant pleaded guilty. No pre-sentence investigation being necessary, Judge O'Connor on the same date sentenced appellant to the mandatory term of 25 years for the robbery offense and to five years on the National Motor Vehicle Theft Act violation. The sentences were made to run concurrently.

On May 7, 1956, appellant filed a motion for a copy of the transcript of the record of proceedings in Cases Nos. 19743 and 19801, such transcripts to be provided at no cost to the appellant. By order of the same date, Judge Yankwich denied the motion, and on May 28, 1956 a notice of appeal from Judge Yankwich's order was filed. No further action was taken in the matter, and on August 13, 1956 the United States moved for a dismissal of the appeal, which was granted on August 14, 1956. The mandate dismissing the appeal from the order of May 7, 1956 was filed on September 6, 1956.

On September 4, 1956 appellant filed a motion for an order requiring the preparation of a transcript of the proceedings at his arraignment and sentence, such transcript to be prepared at the expense of appellant. This motion prompted a letter from the Office of the Clerk of the District Court for the Southern District of California to appellant advising that the reporter's notes concerning the proceedings in Cases 19743 and 19801 for January 19 and February 2, 1948 could not be located, this letter being dated September 13, 1956. Appellant interpreted the letter of September 13, 1956 as indicating that his motion filed on September 4, 1956 had been denied. On October 3,

1956 a notice of appeal from the purported denial of the motion of September 4, 1956 was filed. This appeal was not prosecuted, and on April 29, 1957 the United States moved this Honorable Court to dismiss the appeal of October 3, 1956, and the appeal was dismissed. When it became known that the motion of September 4, 1956 had not been presented to the court, the matter was brought before Chief Judge Yankwich. By order dated February 20, 1957 Judge Yankwich denied the motion of September 4, 1956. Appellant appealed said order to this Court, and on February 7, 1958 the order was affirmed, *Eddy v. United States* (9 Cir., 1958), 256 F. 2d 78.

On November 21, 1958, the appellant filed a petition for a Writ of Error *Coram Nobis* pursuant to Section 1651(a) of Title 28, United States Code. By order of the same date, Judge Yankwich denied the petition for the reason that the allegations set forth no grounds for relief and ordered the clerk not to set the matter for hearing. On December 1, 1958, appellant filed a notice of appeal from Judge Yankwich's order. The appellant's brief was filed on January 17, 1959. Appellant has confined his appeal to that portion of Judge Yankwich's order which specifically directs the Clerk of the Court not to set the motion for hearing.

ARGUMENT.

I.

Though Labeled an Application for Writ of Error Coram Nobis, Appellant's Petition Is in Fact a Motion Under Section 2255 of Title 28, United States Code.

The appellant contends, under the authority of *United States v. Morgan* (1953), 346 U. S. 502, that his petition is an Application for Writ of Error *Coram Nobis*. In that case, the only question presented was whether the United States District Court had the power to vacate its judgment of conviction and sentence after the expiration of the full term of sentence. In such a situation, a proceeding under Section 2255 is not available to the petitioner as he is no longer a "prisoner in custody" within the meaning of that section. The Supreme Court merely held that Section 2255 was not a bar to *coram nobis* and that, where no other remedy was available and circumstances compelled such action to achieve justice, a motion for this extraordinary writ must be heard by the federal trial court.

Here the appellant has neither fully served nor yet begun to serve the sentence which he attacks. Rather, he is in custody under such sentence, and to hold *coram nobis* available under these circumstances would be to destroy the purpose of Section 2255.

Madigan v. Wells (9 Cir., 1955), 224 F. 2d 577, 578, footnote 2.

II.

Appellant Is Not Entitled to a Hearing Where the Petition Does Not Present an Issue of Fact Which, if Established, Shows the Denial of a Constitutional Right.

The appellant's only contention on this appeal is that Judge Yankwich erred in not ordering a hearing concerning the allegations in his petition.

Section 2255 of Title 28, United States Code, states in pertinent part that:

> ". . . unless the motion and the files and records of the case conclusively show petitioner is entitled to no relief, the court . . . shall grant a prompt hearing, . . ."

As stated in *Barker v. United States* (10 Cir., 1955), 227 F. 2d 431, 432:

> "It is clear from the reading of Section 2255, as well as from the decisions, that a petitioner thereunder is not entitled to a formal hearing, to be present, and to offer testimony, unless the petition presents an issue of fact, which, if established, shows a denial of constitutional rights."

See:

> *Moore v. United States* (C. A. D. C., 1957), 249 F. 2d 504.

The only issue for this Court's consideration is whether the allegations in appellant's petition show a denial of constitutional rights. The facts set forth in appellant's petition do not justify the relief requested, and thus the denial of the petition without a hearing was proper.

A. The Statement of the Trial Judge Regarding the Possibility of Parole in No Way Infringed Upon Appellant's Constitutional Rights.

Appellant alleges that prior to the entering of his plea the trial judge stated that appellant would be paroled upon good behavior after one-third of his sentence had been served. Assuming such statement was made, it constituted no more than a correct recital of the law as to when a federal prisoner becomes eligible for parole. (Sec. 714, Tit. 18, U. S. C., now Sec. 4202, Tit. 18, U. S. C.)

The appellant contends that he has served one-third of the sentence imposed and has not been paroled although his behavior has been good. A complaint that the Board of Parole has failed or refused to consider the appellant eligible for parole is not a ground for relief under Section 2255.

United States v. Walker (S. D. N. Y., 1953), 117 Fed. Supp. 502.

B. Appellant's Assertion of Innocence Is Not Sufficient to Require a Hearing.

In order to justify a hearing on a petition under Section 2255 there must be a substantial issue of fact. (*United States v. Hayman* (1952), 342 U. S. 205, 223.) The petition must, therefore, set forth facts, as distinguished from mere conclusions, upon which a right to relief is predicated. In the absence of such facts in the petition, the trial court must deny the motion without a hearing.

Taylor v. United States (8 Cir., 1956), 229 F. 2d 862;

United States v. Strum (7 Cir., 1950), 180 F. 2d 413;

United States v. Cope (W. D. Mo., 1956), 144 Fed. Supp. 799.

In his petition the appellant states that although he pleaded guilty to the charge in the Indictment he is, in fact and in law, innocent. This assertion is purely a conclusion, and thus warrants no consideration in the determination of whether a hearing should be granted.

United States v. Bradford (2 Cir., 1956), 238 F. 2d 395;

United States v. Code, supra.

As stated by Judge Swan in *United States v. Pisciotta* (2 Cir., 1952), 199 F. 2d 603, 606:

> "If it were sufficient to allege merely conclusionary statements, such as, 'I am innocent but was induced to plead guilty against my wishes,' one can readily imagine how many convicts without valid complaint against these sentences would obtain an excursion from a distant penitentiary at government expense."

Quoted also in

Williams v. United States (9 Cir., 1957), No. 15,772, decided December 16, 1957, see 261 F. 2d 224.

C. Appellant's Plea of Guilty Did Not Deprive Him of His Constitutional Rights.

There is no allegation in the petition asserting or even suggesting that the appellant did not willingly and knowingly enter his plea of guilty to the facts set forth in the Indictment. Appellant merely claims that when he entered his plea he was laboring under a misapprehension as to the imposable sentence. This erroneous belief on the part of the appellant in no way affected the validity of his plea, for a misunderstanding as to possible sentence does not equate to a misunderstanding of the nature of the charge. (*Fed. Rules Crim. Proc.,* Rule 11.)

D. Appellant Was Afforded That Degree of Representation by Counsel Guaranteed Him Under the Constitution.

Appellant contends that his plea was entered as a result of ineffective and inadequate counsel.

The petition shows on its face that the charge of inadequate counsel is based solely on the fact that Mr. Cherniss advised the appellant that there was no minimum sentence for the offense charged and that if he changed his plea to guilty the court would sentence him to not more than five years' imprisonment.

Thus, the only erroneous advice given by counsel was in regard to the sentence imposable upon conviction. This is far different from the situation where counsel is derelict in his investigation of the facts or misleads his client on matters concerning the merits of the case.

See:

Kyle v. United States (9 Cir., 1959), No. 16,144, decided February 16, 1959.

It is obvious that appellant's real contention is that he received a sentence more severe than he anticipated. Appellant's complaints are peculiarly susceptible to the language of *United States ex rel. Swaggarty v. Knoch* (7 Cir., 1953), 245 F. 2d 229, 230, where the court, in affirming the denial of a similar petition without a hearing, stated:

> "Appellant was undoubtedly surprised and disappointed by the severity of the sentence imposed upon him. The prediction of his counsel that he would fare better by entering a plea of guilty than if he stood trial seemed to him to be entirely unwarranted. As so often happens after the imposition of a severe sentence, a rash of petitions and motions follows."

See:

United States v. Page (2 Cir., 1955), 229 F. 2d 91;

Sweeden v. United States (8 Cir., 1954), 209 F. 2d 524.

The complaint is no more than an expression of appellant's opinion that he was not well represented. Under the circumstances it would have been absurd for the trial court to send for the petitioner and have him take the stand to restate the same opinion.

Generally it may be said that the Constitution does not guarantee that appointed counsel shall measure up to the notions or standards of ability or competency of the accused. It is enough that the trial court appoints a qualified attorney to represent the defendant and that the attorney appears, advises and represents the defendant at all stages of the proceedings. As this court stated in *Williams v. United States, supra:*

> "The rule in such cases is that stated in United States v. Wight, 2 Cir., 176 F. 2d 376, 379, as follows: 'The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255.'"

See:

Latimer v. Cranor (9 Cir., 1954), 214 F. 2d 926, 929;

Sherman v. United States (9 Cir., 1957), 241 F. 2d 329;

Losieau v. United States (8 Cir., 1949), 177 F. 2d 919;

Moss v. Hunter (10 Cir., 1948), 167 F. 2d 683;

Diggs v. Welch (C. A. D. C., 1945), 148 F. 2d 667.

Conclusion.

Appellant's petition did not allege facts sufficient to show a denial of constitutional right, and thus Judge Yankwich's order of November 21, 1958 denying the petition and not setting the matter for hearing should be affirmed.

Respectfully submitted,

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